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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VINIQUIA REED, Defendant and Appellant.	B285307 (Los Angeles County Super. Ct. No. MA070803)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Strassner, Temporary Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Viniquia Reed (defendant) used her gun to fire what she called a warning shot at a friend, Jordan Bentley-Smith (Bentley-Smith), when they were arguing. At trial, defendant claimed she fired in self-defense because Bentley-Smith, who had been drinking, charged at her with a knife. The jury rejected the defense and convicted defendant of assault with a firearm and discharge of a firearm with gross negligence. We consider whether the trial court prejudicially erred in excluding defense character witness testimony and in permitting impeachment of another witness with a 20-year-old conviction for welfare fraud. We also decide defendant's contention that the trial court should have granted a defense *Batson/Wheeler*[1] motion.

I. BACKGROUND

At the time of the charged offenses, defendant lived in the aptly named Palmdalia apartment complex in Palmdale, California. In the evening on March 14, 2017, defendant had several people over to her apartment: Bentley-Smith, Treanna Grady (Grady), Brooke Hunter (Hunter), and defendant's sister, Arana Reed (Arana). Both defendant and Arana had been friends with Bentley-Smith for years, and Hunter is their cousin. According to defendant, Grady had been Arana's "friend through school for a couple years," but defendant did not know her well. Bentley-Smith had never seen Grady before.

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

A. The Offense Conduct, as Described at Trial by Bentley-Smith and by Defendant, Who Testified in Her Own Defense

On the evening in question, defendant and Bentley-Smith met at a smog test shop in the afternoon and later went to defendant's apartment. After Arana and Grady arrived, Bentley-Smith "tried to get at [Grady]," i.e., "tried to get her name and number." Defendant testified she had warned Bentley-Smith, "'[Grady]'s gay.' You know, 'Don't even try it.'" Grady "shot [Bentley-Smith] down in a cold way," but he "laughed it off" and the group started drinking alcohol. In describing the events that ensued, defendant's and Bentley-Smith's accounts diverged.

1. Defendant's account

Defendant testified she, Arana, and Hunter did not drink much, but Bentley-Smith and Grady drank heavily. Defendant estimated Bentley-Smith had "more than five shots" from "double-shot glass[es]."

As they were drinking, Bentley-Smith continued to make unwelcome sexual advances toward Grady. When defendant and Bentley-Smith were discussing the music industry and Grady interjected to mention she knew a promoter who could help defendant in her career, Bentley-Smith challenged Grady and said she "looks like trash, she's broke," and other "disrespectful things." Bentley-Smith and Grady traded insults, and Bentley-Smith "pushed [Grady's] forehead" with his index finger.

Defendant urged Bentley-Smith to leave the apartment with her and resorted to "bear hug[ging]" him and pushing him "with all the strength [she could] give." Bentley-Smith braced himself against the front door, "refus[ed] to leave," and began

insulting Arana. Arana picked up a glass bottle and threw it at Bentley-Smith but hit defendant instead. When Arana picked up the bottle again, Bentley-Smith got a six-inch knife from the kitchen and "started threatening lives."

As the conflict continued to escalate, defendant went to her room and removed her gun from the safe and pouch she used to store it. She initially left the gun in her room, but she brought it out as Bentley-Smith continued to argue with Arana.

The dispute between Bentley-Smith and the women moved out of defendant's apartment and into a courtyard in the middle of the Palmdalia complex. Bentley-Smith "started flipping out saying . . . he felt like [defendant] set him up to get turned down or rejected [by Grady]." He said he would "kill all of us" and "charged at [defendant]." Defendant then fired a "warning shot." She demonstrated her actions on the witness stand, which defense counsel described as "raising [the gun] and appearing to fire it basically at—with the hands at shoulder level, pointing straight ahead indicating to the side. In other words, shooting not at the person coming but to the side of that person." After the gunshot, Bentley-Smith relented and defendant returned to her apartment. About eight minutes later, defendant heard someone screaming because Bentley-Smith had broken the window of another Palmdalia tenant's apartment.

2. Bentley-Smith's account

Bentley-Smith acknowledged he was "buzzed," but denied getting drunk in defendant's apartment. He also denied making unwanted sexual advances toward Grady and touching her in an aggressive manner. He conceded that he and Grady argued about music industry contacts, the argument "got a little heated,"

and defendant urged him to leave with her. Bentley-Smith testified, however, that the bottle thrown by Arana struck his hand and made him drop his phone. At no point did he have a knife.

As Bentley-Smith went to pick his phone up off the floor, defendant held Arana and Grady back. Bentley-Smith left the apartment with defendant behind him. Once in the courtyard, Bentley-Smith was going to turn around when defendant fired a shot at him. Bentley-Smith yelled, "Why did you do that? If you did it, you should have just killed me." Defendant walked back to her apartment still aiming the gun at Bentley-Smith, and Bentley-Smith punched a window as he left the complex. He drove immediately to a Los Angeles Sheriff's Department (LASD) station to report what happened.

B. Trial Testimony from Bystanders and Investigating Officers

Two other Palmdalia residents testified at trial. Chantal Nowlin (Nowlin) heard, but did not see, the confrontation in the courtyard and called 911. Nowlin was not acquainted with defendant or her guests. Nowlin testified she heard a man screaming at a crying woman and the man said he "was going to come back and everybody in the building was going to die." She then heard a gunshot followed immediately by breaking glass.[2] Another neighbor, Daveion Young (Young) saw part of the confrontation from outside his front door. Although it was dark

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[2] Nowlin reported a different sequence—the gunshot, then the man's threat, then breaking glass—in recorded phone calls and a prior law enforcement interview. Testifying at trial, Nowlin insisted the threat preceded the gunshot.

and Young's view of the scene was partly obscured, he saw Bentley-Smith "yelling" and "moving toward" defendant in an "aggressive" manner. He did not see any weapons. After "a minute, minute and a half," Young heard the gunshot and, seconds later, saw Bentley-Smith break a window.

LASD deputy Zachary Gregg and detective Matthew Pereida also testified at trial. Gregg was one of several deputies who responded to Nowlin's 911 call. He testified deputies found defendant's .22 caliber semi-automatic handgun in a kitchen cupboard in defendant's apartment, along with several bullets inside a bag of sugar. Detective Pereida testified that when he contacted Lisa Miller (Miller), the Palmdalia's manager at the time of the shooting, she told him the "the cameras were inoperable and did not capture any video surveillance footage of [the relevant] area during that specific time." Detective Pereida acknowledged he did not "remember exactly what [Miller] had told [him], but [he] just kn[ew] that the cameras weren't working and [he] wasn't able to retrieve video surveillance."

Miller testified she told LASD personnel who inquired about surveillance video that all cameras were functioning but she could not retrieve the video because a password had been changed. As discussed in greater detail *post*, the trial court permitted the prosecution to generally impeach Miller's testimony by establishing she was convicted of welfare fraud, a felony, in 1997.

C. The Defense Case, Verdicts, and Sentence

As is already clear from our recitation of the background facts thus far, defendant testified in her own defense. In addition, the defense sought to call two character witnesses:

Esmeralda Caldera (Caldera), another Palmdalia manager, and Harold Cofer, Jr. (Cofer), defendant's employer.

The defense proffered, based on a letter Caldera wrote, that she would testify defendant lived at the Palmdalia for two years, paid her rent on time, was respectful with neighbors and management, and never had any nuisance complaints lodged against her. Cofer was expected to provide testimony consistent with a letter of recommendation he prepared for defendant—four months before the charged firearm assault—that lauded defendant's job performance and character.[3]

The trial court reasoned Caldera's testimony was not relevant based on what the defense had proffered. Explaining, the court said testimony to the effect that defendant "pay[s] her rent on time and . . . has not gotten in any feuds with any of her fellow neighbors" would not be probative of defendant's reputation in the community without further testimony regarding "how well [Caldera] knows [defendant]," and whether "they hang out outside of [the] manager/tenant situation,

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[3] As read by counsel into the record, the letter, in full, stated: "[T]his recognition award letter is to highlight [defendant] for her continued excellence in customer service and outstanding attitude toward daily operations. [¶] [Defendant] has been a great citizen as well as a positive influence amongst peers. [Defendant] goes above and beyond the call of duty anytime she receives an assignment. [She] has shown growth and leadership and focuses on being an asset to colleges and business owners. I have submitted this recommendation as an award to her for remaining consistent in having very high character. [Defendant's] integrity is second to none and it's an absolute honor having her on board."

anything of that nature."[4] The trial court similarly concluded Cofer's proffered testimony was not relevant either, both because the letter that provided the basis for the proffer was written four months before the charged offense conduct and because the proffer "doesn't reference her character in the community[, i]t references that she is a team player at her job." In rendering its formal ruling on the record, the trial court excluded the testimony from both witnesses "under 1103 as well as 352."[5]

Following closing argument by counsel, the trial jury convicted defendant on both charged counts, assault with a firearm (Pen. Code, § 245, subd. (a)(2)) and discharge of a firearm with gross negligence (Pen. Code, § 246.3, subd. (a)). The trial court sentenced defendant to a two-year prison term: the low term of two years for assault with a firearm and the middle term of two years for discharge of a firearm with gross negligence—with the latter stayed pursuant to Penal Code section 654.

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[4] Defense counsel suggested he might "try to get more specifics from [Caldera]," but the record does not include any further discussion of the issue.

[5] The references are to provisions of the Evidence Code. Evidence Code section 352 gives a trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court appears to have misspoken in citing Evidence Code section 1103; rather, the pertinent section is Evidence Code section 1102, which, in subdivision (a), allows a defendant to offer evidence of a character trail in the form of an opinion or reputation to prove conduct in conformity with that character trait.

II. DISCUSSION

The two evidentiary rulings defendant challenges on appeal do not warrant reversal. The trial court did not abuse its discretion in excluding the proffered character witness testimony from Caldera and Cofer because defendant made no adequate showing they would testify to a relevant character trait. Nor is reversal warranted for the trial court's decision to allow the prosecution to impeach Miller with a 20-year-old welfare fraud conviction because the impeachment, and Miller's testimony generally, were merely tangential to the issues the jury had to decide.

As for defendant's *Batson*/*Wheeler* contention, defendant maintains the trial court erred at the third stage of a *Batson*/*Wheeler* inquiry, i.e., in determining that the prosecution's reason for excusing a Black prospective juror was genuine and non-discriminatory. We accord appropriate deference to the trial court's determination because the record shows the court made a sincere and reasoned effort to evaluate (indeed, the court's own observations corroborated) the prosecution's reason for excusing the prospective juror, namely, that the juror was hesitant to agree adequate proof of a fact could come from the uncorroborated testimony of a single witness. Viewed through that deferential lens, defendant's efforts at engaging in comparative juror analysis for the first time on appeal to discredit the trial court's determination are unpersuasive.

A. The Trial Court's Exclusion of Defendant's Character Witnesses Was Not an Abuse of Discretion

Evidence Code section 1101, subdivision (a), sets forth the general rule that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1102 establishes an exception to this general rule: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. . . ." The Evidence Code section 1102 exception to the general bar on character evidence "allows a criminal defendant to introduce evidence, either by opinion or reputation, of his character or a trait of his character that is 'relevant to the charge made against him.' [Citations.] Such evidence is relevant if it is inconsistent with the offense charged—e.g., honesty, when the charge is theft—and hence may support an inference that the defendant is unlikely to have committed the offense." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1305 (*McAlpin*).)

Lay opinion testimony admissible under Evidence Code section 1102 must be "based on the witness's personal observation." (*McAlpin*, *supra*, 53 Cal.3d at p. 1307.) Reputation evidence, on the other hand, "'is not what a character witness may *know* about a defendant. Reputation is the estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of

him either by the witness or others." (*Id.* at p. 1311.) Evidence Code section 352 may be invoked to limit evidence otherwise admissible under Evidence Code section 1102. (See *People v. Wagner* (1975) 13 Cal.3d 612, 619.) "We review a trial court's evidentiary rulings under [Evidence Code sections 352, 1101, and 1102] for abuse of discretion." (*People v. Doolin* (2009) 45 Cal.4th 390, 437.)

Defendant contends Caldera and Cofer's testimony would have bolstered her self-defense claim by establishing her reputation "for being law-abiding and peaceful, a 'great citizen' with 'very high character[ ]' and integrity." There is no dispute that, based on the defense proffers, Caldera and Cofer had positive impressions of defendant. The trial court, however, did not abuse its discretion in excluding the testimony because the proffers were insufficient to establish either witness would competently testify as to her reputation for peacefulness—the only characteristic that was truly relevant by being "inconsistent with the offense[s] charged."[6] (*McAlpin*, *supra*, 53 Cal.3d at p.

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[6] Some of the trial court's comments were focused on determining how closely defendant was acquainted with Caldera and Cofer, which as defendant argues, is not *necessarily* indicative of their knowledge of her reputation for peacefulness. But the defense testimonial proffers, in the form of letters from Caldera and Cofer, did not expressly discuss her reputation for peacefulness, and the court's comments on the witnesses' familiarity with defendant can be understood as attempts to discern whether they were likely to offer a competent opinion on that score.

Defendant, however, argues it does not matter that such an express opinion was absent from Cofer's written proffer because he presumably would not praise defendant as he did in his letter if he had a negative view of her reputation for peacefulness. This

1305; see also Evid. Code, § 403, subd. (a) ["The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact"].)

Indeed, defendant concedes "neither offer of proof . . . showed that [Caldera or Cofer] knew . . . 'people with whom [defendant] associated in the community[ ]' or '[people with] any information regarding her character or reputation in the community for non-violence[,]'" but defendant nevertheless contends Caldera and Cofer could have testified about her reputation for peacefulness even if they did not "know[ ] [her] socially," "know[ ] others who [she] knew," or "know[ ] others who had character information." But the notion that one can form a view of another's reputation based solely on personal acquaintance—i.e., without any other acquaintances in common—ignores the inherently social character of reputation. (See, e.g., *People v. Paisley* (1963) 214 Cal.App.2d 225, 232 [trial court did not abuse its discretion in excluding witness whose opinion of another witness's character was based on conversations with two people "because '[y]ou can't get a general

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is true so far as it goes. But it does not follow that Cofer would only offer such praise if he had a positive view of her reputation for peacefulness. Cofer might very well have no view one way or the other as to defendant's reputation for peacefulness, and without a proffer establishing the existence of such a view, the trial court could reasonably determine the testimony was not relevant.

reputation by talking to two people"'].) This is especially so when, in light of the facts proffered by the defense, the two proposed character witnesses' familiarity with defendant was as narrow and limited as it was.

Furthermore, even conceding for argument's sake that the two character witnesses may have had *some* relevant reputational testimony to offer, the trial court also expressly relied on Evidence Code section 352 to exclude the testimony and this was certainly within the court's discretion. Evidence Code section 352, of course, permits a court to exclude relevant evidence when the probative value of the evidence is substantially outweighed by the probability that it will necessitate undue consumption of time at trial. The time it would take for direct and cross-examination of the two character witnesses was not great, but assuming there was some probative value in the proffered character testimony, the trial court could reasonably conclude that probative value was still so low as to be unworthy of even a relatively short diversion.

Defendant protests, however, that it does not matter whether the trial court could arrive at such a conclusion because the record does not affirmatively demonstrate the court performed the balancing contemplated by Evidence Code section 352.[7] This, however, is wrong, as evidenced most clearly by the

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[7] Defendant asserts, for instance, the trial court "did not mention *any* factor or analysis under Evidence Code section 352, and the record as a whole fails to show the court performed any of its obligations." This is an overstatement. The court analyzed the relevance of the proffered testimony extensively on the record and relevance (or "probative value") is indeed one of the major components of an Evidence Code section 352 analysis.

court's on-the-record reference to Evidence Code section 352 when making its ruling. No more was required. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169 ["[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352"].)

B. Defendant Was Not Prejudiced by Evidence of Miller's Conviction for Welfare Fraud

Subject to the trial court's discretion under Evidence Code section 352, a witness's prior felony conviction for a crime of moral turpitude is admissible to impeach the witness. (Evid. Code, § 788; *People v. Green* (1995) 34 Cal.App.4th 165, 182 (*Green*).) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. (*People v. Beagle* (1972) 6 Cal.3d 441, 453[ ]; [ ] *Green*[, *supra*, at p.] 183[ ].)" (*People v. Clark* (2011) 52 Cal.4th 856, 931.) We review a trial court's decision to admit prior felony convictions for impeachment purposes for abuse of discretion. (*Green*, *supra*, at pp. 182-183.)

In the trial court, the defense sought to bar impeachment with the prior conviction because it was too old, having been sustained in 1997, some 20 years before. The prosecution contended the age of the conviction was mitigated by the fact that Miller had "continuously violated probation until 2010 when she

was finally sentenced to prison." The trial court allowed the impeachment, reasoning the conviction was not too remote in light of the probation violation that led to prison time in 2010. Defendant now argues this was error because, as she contended below, the conviction was too remote.

Despite a lack of "consensus among courts as to how remote a conviction must be before it is too remote," at least one court has held that "a conviction that is 20 years old, as in the case at bar, certainly meets any reasonable threshold test of remoteness." (*People v. Burns* (1987) 189 Cal.App.3d 734, 738.) On the other hand, it is well established that "convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the [witness] has not led a legally blameless life since the time of the remote prior [conviction]." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.)

Whatever the merits of defendant's remoteness argument, we think one thing is abundantly clear: the impeachment vel non of an obviously collateral witness at trial obviously had no bearing on the verdicts rendered by the jury. In other words, in the language of the pertinent case law, it is not reasonably probable that defendant would have obtained a more favorable result in the absence of error. (*People v. Collins* (1986) 42 Cal.3d 378, 391-392 [*People v. Watson* (1956) 46 Cal.2d 818 standard applies in assessing prejudice resulting from erroneous admission of prior convictions].)

There is no reason to think the result in this case turned on Miller's credibility. Indeed, by the end of the trial, it wasn't even clear there was any meaningful conflict between Detective Pereida and Miller's testimony; as the prosecution argued in

closing, "[Detective Pereida] did not quote Ms. Miller saying that there was no video. He said that the take-away was there was no video that was accessible." But proceeding on the understanding there was a true conflict, the key dispute at trial was not over whether the jury credited Miller over Detective Pereida. Rather, this was a credibility contest turning on whether the jury believed defendant or Bentley-Smith, and the attention paid to the credibility of both during the closing arguments of both sides reflects that; references to Miller and the video cameras at the Palmdalia were miniscule portions of the closing arguments. While defendant now believes Miller's credibility was important because conflict between her testimony and that of Detective Pereida showed the investigation to be "sloppy" in a manner that "necessarily implicated the interviews of [defendant] and Nowlin," defendant does not explain the nexus between "sloppiness" in collecting surveillance video and Detective Pereida's interviews of defendant and Nowlin, and we see none. The jury was never asked to rely on Detective Pereida's potentially "sloppy" notes from these interviews—rather, the interviews were audio-recorded and the recordings of both were played at trial.[8]

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[8] We are also not persuaded that the fact that "two out of three of [defendant's] witnesses [i.e., Miller and Young] had prior felony convictions" prejudiced defendant. There was no evidence that Miller knew either defendant or Young and therefore no basis to suppose her criminal history somehow undermined their credibility by association.

C. Substantial Evidence Supports the Trial Court's Determination that the Defense Did Not Show Intentional Discrimination

Defendant contends the prosecution's use of a peremptory challenge to excuse one of two Black prospective jurors[9] from the initial 20-person panel of the venire was intentionally discriminatory and the trial court was wrong to find otherwise. We hold substantial evidence, including the trial court's own observations that it placed on the record, supports the court's finding that the prosecution's reason for excusing the prospective juror—the juror's reluctance to agree with the proposition that the testimony of a single witness may be sufficient to prove a fact—was genuine and race-neutral.

1. Voir dire

During voir dire, the prosecution asked prospective jurors whether they would be able to comply with an instruction that the testimony of a single witness may be sufficient for the proof of a fact. As discussed *post*, defendant's *Batson*/*Wheeler* motion concerns a Black man dubbed Prospective Juror No. 18 (Juror No. 18).[10]

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[9] The other Black juror in the initial panel, prospective juror number 6, was not challenged and was seated as a trial juror.

[10] The parties' differing appellations for this juror are confusing. Defendant opts, for no record-based reason, to refer to this juror as "Removed Juror B." The Attorney General refers to the juror as "prospective juror 5" because the juror took the number five spot in the jury box right before he was excused.

The prosecutor first raised the issue in a question to Prospective Juror No. 19 (Juror No. 19): "You'll hear from the judge if you're on the jury that another legal instruction is that one witness is enough to prove any fact, okay? [¶] Do you feel like you would be able to follow that, or do you think that in a court setting you're going to require—like, you really need to hear from multiple people who all are testifying to the same thing?" Juror No. 19's initial response was somewhat ambivalent: "I could definitely follow, I guess, depending on what it is."

After the prosecutor probed further by presenting a hypothetical to illustrate the concept, Juror No. 19 said, "I feel that if there's a witness and there's more facts or more things that will point that way, it might be sufficient." Juror No. 19 then elaborated, "If the facts and the testimony of the witness corroborates with each other, it would be easier to say that that's the right way or that's probably what happened." When the prosecutor asked how Juror No. 19 felt "about . . . the situation where the testimony of the witness is the presentation of that fact," the juror responded, "If it's—I mean, if they saw it, I guess that's probably what happened. That's probably what they saw. I guess it would be enough." Juror No. 19 ultimately agreed that, if he or she believed a witness, he or she would "be able to say, I believe this beyond a reasonable doubt."

The prosecutor then turned to Prospective Juror No. 5 (Juror No. 5), who said, "Well, sometimes there is only one witness to an incident; but I would hope the rest of the presentation would highlight that one testimony with more information." The prosecutor clarified, "So you would like to have supplemental information?" Juror No. 5 responded, "Yes, even if it's not a witness, I would like to see more."

The prosecutor asked whether "anyone feel[s] the same as Juror No. 5" and "would want additional information to prove a fact." Two prospective jurors, Prospective Juror No. 2 (Juror No. 2) and the Black juror in question, Juror No. 18, raised their hands. Juror No. 2 explained, "I would just want to see something, some other stories or evidence to corroborate that witness." Juror No. 18 agreed, "Yeah. I would need some independent kind of facts to back up the testimony."

The prosecutor next asked whether any other prospective jurors felt the same way as Juror Nos. 2 and 18. Prospective Juror No. 1 (Juror No. 1) and Juror No. 4 (Juror No. 4) raised their hands. Juror No. 1 explained, "In listening to the witnesses, some people are very good at imparting of information and others are not. It would be difficult to really tell if the witness was being truthful or not simply by listening to them or observing them. [¶] In my case, I would really prefer to have some physical evidence to back up the facts[;] not saying that the witness is not being truthful but rather that the witness is describing what he or she believes they saw." The prosecutor clarified that, "in evaluating the witness's testimony, you're not going to be just listening to it in a vacuum. You're going to be listening to it in conjunction with anything else that's presented to you to come to a decision." Juror No. 1 agreed. The prosecutor turned to Juror No. 2, who also agreed.

The prosecutor then asked, "Okay. All right. So do you feel that you would, however, be able to say, you know, in evaluating everything that's presented to you, that you would be able to follow the law in regards to, you know, a fact can be proven by the testimony of a witness, you know, while you're also looking at everything else that will prove everything as a whole? [¶] Does

that make sense? [¶] So there are different requirements, different elements, for crimes. So a witness's testimony can prove maybe part of that, but then everything else together proves the whole." It is not clear from the reporter's transcript to whom this question was addressed, but Juror No. 1 answered "[y]es." Juror No. 1 went on to explain that, "if all we had was the testimony of the witness, we had no physical evidence to back it up but no other testimony to refute the witness's testimony, I would really have no choice but to assume that the witness is being truthful because I see no evidence, no other testimony, to counter the witness's testimony."

The prosecutor remarked that the juror's answer was "very well summed up" and asked the prospective jurors generally, "Anybody feel differently from Juror No. 1?" There was no verbal response, although Juror No. 4 raised a hand. The prosecution called on Juror No. 4 and asked whether he or she agreed with Juror No. 1. Juror No. 4 assented and mentioned having read "various articles and summaries of studies showing that the reliability of eyewitnesses and their ability to remember the events as they've happened as he described."

Among the prospective jurors against whom the prosecution exercised peremptory challenges were three of the six prospective jurors involved in the foregoing discussion: Juror Nos. 4, 5, and 18. The other prospective jurors with whom the prosecution engaged on this issue—Juror Nos. 1, 2, and 19—were ultimately seated on the jury.

When the prosecutor exercised a peremptory challenge against Juror No. 18, the defense objected on *Batson*/*Wheeler* grounds. Arguing the *Batson*/*Wheeler* issue, defense counsel stated: "[Juror No. 18] is an African-American individual. My

client is African-American. I would note that there were only two African-Americans among the 20 that we questioned, and if I'm not mistaken, out of the entire [venire] of 40 jurors that was sent to us. I didn't hear [Juror No. 18] say anything whatsoever that could remotely suggest any reasonable basis to challenge him other than simply his race."

The trial court ruled defense counsel had established a prima facie case of discrimination and the prosecutor gave his reason for exercising the peremptory challenge: "In my conversation with the panel with regards to the witnesses, [Juror No. 18] indicated that he would need additional evidence aside from that. I was able to clarify with Juror [No.] 1 and another Juror, whose number I can't recollect right now, that they would follow the law. [¶] When I asked . . . the people if they would agree with them, most people nodded their heads 'yes.' [Juror No. 18] seemed a bit hesitant so I decided not to inquire further so as to not get at something that could taint the jury, but my impression from him was that even if he believed the testimony of the witness that he would not find that would be enough, that he would need additional information. So that was the last impression that I had." The trial court inquired whether the defense wanted to argue the issue further or "submit," and the defense opted to submit the matter. No comparative analysis of the prospective jurors was therefore undertaken in the trial court.

The trial court denied the *Batson*/*Wheeler* motion. The court explained the rationale for its ruling on the record: "The court does find the reasons offered by the prosecution to be credible. Specifically, the court also did note in [its] notes based upon [the prosecution's] voir dire that Juror No. [18] would want

facts to back up his statements. The court made a notation of that fact, and there was no other questioning related to that. However, he was one of those individuals that did raise their hand relating to that he would, in essence—it was relating to circumstantial evidence or questioning relating to sole witness testifying and whether there needed to be enough to prove that fact or whether there needed to be additional evidence. He was one of the individuals that indicated that he would like to see additional evidence to back up any testimony, and so the court did make a notation of that as well. [¶] His lack of answering the questions relating to the understanding by Jurors No. 1 and 4, who, subsequently, indicated that they would take everything as a whole relating to the individual testimony of one witness versus the testimony as a whole, he was not—he did not answer up that he was in agreement or in disagreement with that one way or the other. [¶] However, based upon the fact that he did indicate his issue with wanting facts to back up testimony, which is what his words were, the court does feel that specifically that [defense counsel's] . . . *Batson Wheeler* motion is denied."

2. Applicable law

Both the federal and state Constitutions prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race, gender, ethnicity, or other cognizable grounds. (*People v. Scott* (2015) 61 Cal.4th 363, 383 (*Scott*); see also *Batson*, *supra*, 476 U.S. at p. 97; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) "Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*).)

"The familiar *Batson*/*Wheeler* inquiry consists of three distinct steps. The opponent of the peremptory strike must first make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. If a prima facie case of discrimination has been established, the burden shifts to the proponent of the strike to justify it by offering nondiscriminatory reasons. If a valid nondiscriminatory reason has been offered, the trial court must then decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 42; *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) The third step involves an evaluation of the credibility of the prosecutor's neutral explanation, which "may be gauged by examining factors including but not limited to """the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."' [Citation.]" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1168.)

"'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses . . . . [Citation.]" (*People v. Winbush* (2017) 2 Cal.5th 402, 434.) Moreover, "[w]e recognize that the trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility. [Citation.]" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) "When the trial court makes a sincere and reasoned effort to evaluate the prosecutor's reasons, the reviewing court defers to its conclusions on appeal, and examines only whether substantial

evidence supports them." (*People v. Melendez* (2016) 2 Cal.5th 1, 15 (*Melendez*).)

3. Analysis

As a threshold matter, the parties dispute the question to which the prosecution claimed Juror No. 18 responded hesitantly. When justifying his exercise of the peremptory challenge against Juror No. 18, the prosecution explained he "was able to clarify with Juror [No.] 1 and another Juror, whose number I can't recollect right now, that they would follow the law. [¶] When I asked about the people if they would agree with them, most people nodded their heads 'yes.' [Juror No. 18] seemed a bit hesitant . . . ."

The Attorney General contends the prosecution was referring to the moment at which, after clarifying the law with Juror Nos. 1 and 2, the prosecution went on to ask, "So do you feel that you would, however, be able to say, you know, in evaluating everything that's presented to you, that you would be able to follow the law in regards to, you know, a fact can be proven by the testimony of a witness, you know, while you're also looking at everything else that will prove everything as a whole? [¶] Does that make sense?" Defendant, by contrast, contends the prosecution was referring to the moment when, after Juror No. 1 incorrectly stated he or she "would really have no choice but to assume [an unrefuted] witness is being truthful," the prosecution praised this statement as "very well summed up" and asked, "Anybody feel differently from Juror No. 1?"

The transcript does not, of course, reflect when individual jurors nodded their heads. Nor does it reflect whether the prosecution, through gesture, eye contact, or other body

language, addressed the foregoing questions to an individual juror or to a group that included Juror No. 18. This is why our Supreme Court has emphasized that the trial court's "first-hand observations" are particularly important when a prosecutor invokes a juror's demeanor as a nondiscriminatory justification for exercising a peremptory challenge. (*Lenix*, *supra*, 44 Cal.4th at p. 614.) "[T]hese determinations of credibility and demeanor "'lie "'peculiarly within a trial judge's province,"'"'" and "'"'in the absence of exceptional circumstances, we . . . defer to [the trial court]." [Citation.]' [Citation.]" (*Ibid.*)

Here, the trial court noted Juror No. 18's "lack of answering the questions relating to the understanding by Jurors No. 1 and 4, who[ ] subsequently[ ] indicated that they would take everything as a whole relating to the individual testimony of one witness versus the testimony as a whole . . . ." This summary supports the Attorney General's position that Juror No. 18 hesitated in assenting to the prosecution's statement as opposed to Juror No. 1's explanation, and there is no reason not to defer to the trial court. The minor differences in phrasing do not, as defendant suggests, amount to the trial court "substitut[ing] [its] own reasoning for the rationale given by the prosecutor," as prohibited by *Gutierrez*.[11] (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.)

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[11] Defendant contrasts the trial court's reference to Juror No. 18's "lack of answering" and failure to "answer up" with the prosecution's reference to his having nodded hesitantly. But defendant's emphasis of this difference belies a fundamental agreement between the prosecution and the trial court that Juror No. 18, unlike other prospective jurors, did not readily assent to the prosecution's statement. The discrepancy does not undermine the trial court's "sincere and reasoned" effort to evaluate the prosecution's justification for exercising a

With that issue resolved, the real thrust of the challenge defendant now mounts to the trial court's *Batson*/*Wheeler* ruling is an effort at comparative juror analysis not undertaken in the trial court. Specifically, defendant argues the prosecution struck one of the two Black prospective jurors on grounds equally applicable to three other prospective jurors, Juror No. 1, Juror No. 2, and Juror No. 19 (who defendant refers to as Juror No. 5)—all of whom were ultimately seated on the jury.

"Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Lenix*, *supra*, 44 Cal.4th at p. 624; accord, *Melendez*, *supra*, 2 Cal.5th at p. 15 ["When comparative juror arguments are made for the first time on appeal . . . , the prosecutor [is] not asked to explain, and therefore generally [does] not explain, the reasons for not challenging other jurors. In that situation, the reviewing court must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable. Accordingly, we consider such evidence in light of the deference due to the trial court's ultimate finding of no discriminatory purpose"].)

The three comparator jurors identified by defendant are not good comparators at all. All eventually provided assurances that they understood the testimony of a single witness may be sufficient to prove a fact. Juror Nos. 1 and 2 agreed with the prosecution's paraphrase of their position that, "in evaluating the witness's testimony, you're not going to be just listening to it in a

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peremptory challenge against Juror No. 18. (*Gutierrez*, *supra*, 2 Cal.5th at pp. 1172-1173.)

vacuum. You're going to be listening to it in conjunction with anything else that's presented to you to come to a decision." Juror No. 19 responded affirmatively to the prosecution's question, "Do you think that you would be able to say, like, if you believed [a witness,] be able to say, I believe this beyond a reasonable doubt?" Moreover, these jurors apparently nodded their assent when the prosecution asked whether they agreed that a fact can be proven by the testimony of a single witness. Juror No. 18 was different: he expressed an unrepudiated "need [for] some independent kind of facts to back up the testimony." That difference provided a sound basis for a genuine judgment that he should be excused while there was no need to object to the others, and the fact that the other Black prospective juror in the jury panel was seated on the trial jury without objection provides some further assurance that intentional discrimination on the basis of race was not afoot. (*People v. Cunningham* (2015) 61 Cal.4th 609, 665).

Defendant protests, however, that even if Juror Nos. 1, 2, and 19 eventually abandoned their reservations about the probative value of a single witness's testimony, the prosecution deliberately avoided asking Juror No. 18 the sort of follow-up questions that might have rehabilitated him as well. Our Supreme Court has held that "[a] failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual." (*People v. Lomax* (2010) 49 Cal.4th 530, 573.) Even though such an argument was not raised by the defense in the trial court, the prosecutor had the foresight to address precisely this point in giving his statement of reasons. The prosecutor explained that after he observed Juror No. 18's

hesitation in response to the panel-wide question posed after the colloquy with individual jurors, the prosecutor was reluctant to question Juror No. 18 further "so as to not get at something that could taint the jury . . . ." That is a valid concern for an attorney to have in voir dire, it is a concern that is buttressed to some degree by the trial court's own observations of Juror No. 18's non-responsiveness to the group-wide question after voir dire of individual jurors, and it dispels the notion that the prosecution's decision to refrain from *further* individual questioning of Juror No. 18 could be considered desultory voir dire indicative of intentional discrimination. (See *Melendez*, *supra*, 2 Cal.5th at p. 19 [prosecution's brief questioning of prospective juror "of little significance"].)

Substantial evidence supports the trial court's stage three *Batson*/*Wheeler* ruling.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.